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In The

Supreme Court of the United States

PT PERTAMINA (PERSERO), f/k/a PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA,
Petitioner,

v.

KARAHA BODAS COMPANY, L.L.C.,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

KBC'S OPPOSITION AND RESPONSE TO MOTION OF THE REPUBLIC OF INDONESIA FOR LEAVE TO FILE A BRIEF AS AN *AMICUS CURIAE*

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STATUTES AND RULES

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, implemented by 9 U.S.C. §§ 201 *et seq.* (the "New York Convention") ..... *passim*

MISCELLANEOUS

Frederick B. Wiener, BRIEFING AND ARGUING FEDERAL APPEALS 269 (1961) 1, 3

Pursuant to Supreme Court Rule 37.5, Respondent Karaha Bodas Company, L.L.C ("KBC") respectfully submits this opposition and response to the motion of the Government of the Republic of Indonesia ("ROI") for leave to file a brief as an *amicus curiae* in support of the petition for certiorari.

INTRODUCTION

Petitioner PT Pertamina (Persero), f/k/a Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") has had the opportunity to fully brief the questions presented in its petition for a writ of certiorari by filing both a 25-page initial brief and a 10-page reply brief. For the reasons set forth in KBC's brief in opposition, the petition does not present an issue warranting this Court's review. Now, the ROI – which asserts that it "has a direct interest in this case" because "[i]t is the sole owner of . . . Pertamina" – seeks leave to file an additional 19-page brief, ostensibly as an *amicus curiae*. ROI Mot. 1.[1]

The motion for leave should be denied for several reasons. As an initial matter, the ROI does not advance an interest separate from Pertamina's, but simply makes additional arguments on Pertamina's behalf. The "function of an *amicus*," however, "is to assert 'an interest of its own separate and distinct from that of the [parties].'" *United States v. Barnett*, 376 U.S. 681, 738 (1964) (quoting Frederick B. Wiener, BRIEFING AND ARGUING FEDERAL APPEALS 269 (1961)). In addition, the ROI presents a question for this Court's review not raised by Pertamina, or even addressed in the petition. *See Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 262, n.6 (1994) (declining to address a First Amendment question argued by respondents and the *amici*, but not presented for review in the petition); *Knetsch v. United States*, 364 U.S. 361, 370 (1960)

[1] Citations to "ROI Mot." are to the ROI's motion for leave; "ROI Br." citations are to the *amicus curiae* brief accompanying the motion.

(finding "no reason" to address an argument advanced only in an *amicus* brief, and not the petition).

Even if the ROI were a proper *amicus*, the questions it presents do not warrant this Court's review. The ROI argues that this Court should use this case to decide whether a federal court must apply federal common law in deciding what country's procedural law governs an international arbitration. Contrary to the ROI's argument, however, there simply is no circuit conflict on this issue: in the two appellate decisions on which the ROI relies, the courts did not decide what procedural law governed the arbitration, but instead decided whether arbitration could be compelled. *See InterGen N.V. v. Grina*, 344 F.3d 134 (1st Cir. 2003) (deciding whether a non-signatory to arbitration agreement could be compelled to arbitrate); *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88 (2d Cir. 1999) (deciding whether assignment after effective date of arbitration clause deprived assignees of right to compel arbitration). The cases are thus inapposite to the questions presented for review by the ROI.

In addition, and as set forth in more detail below, the ROI's argument that Indonesian procedural law governed the arbitration in this case, and thus that Indonesia was an appropriate country in which Pertamina could seek to set aside the arbitral award, is wholly inconsistent with Pertamina's prior arguments (made in various courts) that *Swiss* procedural law governed the arbitration and that *Switzerland* was the appropriate country in which to challenge the arbitral award. The Fifth Circuit correctly decided that Pertamina is judicially estopped from taking the opposite position, Pet. App. 25a; that holding provides an alternative basis supporting the decision below. Moreover, the ROI's argument that the Fifth Circuit should have applied federal common law in deciding what procedural law applied is inconsistent with its (and Pertamina's)

arguments early in this litigation that the Fifth Circuit and district court should apply the New York Convention in deciding that question.

In sum, this Court should reject the ROI's attempts to further delay enforcement of a valid arbitral award based on shifting and inconsistent arguments not even presented in the petition for certiorari.

REASONS FOR DENYING THE MOTION

I. THE ROI DOES NOT HAVE AN INTEREST SEPARATE AND DISTINCT FROM PERTAMINA'S.

This Court's Rules state that a motion for leave to file an *amicus curiae* brief in support of a petition "is not favored." Sup. Ct. Rule 37.2(b). Such a motion is especially inappropriate where, as here, the proposed *amicus* has interests that are one and the same as the petitioner. As this Court has explained, the "function of an *amicus* is to assert 'an interest of its own separate and distinct from that of the [parties].'" *United States v. Barnett,* 376 U.S. 681, 738 (1964) (quoting Frederick B. Wiener, BRIEFING AND ARGUING FEDERAL APPEALS 269 (1961)).[2] The ROI's interests, however, are the exact same as those of its wholly owned subsidiary, which has been given ample opportunity to advance its interests.

Indeed, a would-be *amicus* could scarcely have interests more closely aligned with the Petitioner than the ROI. The ROI itself argues that it "has a direct interest in this case" because "[i]t is the sole owner of Petitioner [Pertamina] and . . . has directed Pertamina" to oversee on its

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[2] Other courts have found that a patently partisan party should not be allowed to participate as an *amicus curiae. See, e.g., United States v. Michigan*, 940 F.2d 143, 164-65 (6th Cir. 1991) (stating that "the orthodox view of amicus curiae was, and is, that of an *impartial* friend of the court – *not an adversary party in interest in the litigation*") (emphasis in original) (citing *Miller-Wohl Co. v. Comm'r of Labor & Indus., State of Montana*, 694 F.2d 203, 204 (9th Cir. 1982)); *Liberty Lincoln Mercury, Inc. v. Ford Mktg. Corp.*, 149 F.R.D. 65, 82 (D.N.J. 1993) ("When the party seeking to appear as amicus curiae is perceived to be an interested party or to be an advocate of one of the parties to the litigation, leave to appear amicus curiae should be denied."); *Yip v. Pagano*, 606 F. Supp. 1566, 1568 (D.N.J. 1985) ("Where a petitioner's attitude toward the litigation is patently partisan, he should not be allowed to appear as *amicus curiae*.") (citation omitted), *aff'd,* 782 F.2d. 1033 (3d Cir. 1986).

behalf "the exploration, development, and exploitation of Indonesia's oil and gas resources." ROI Mot. 1. Indeed, the ROI states that it is financially intertwined with Pertamina: "Pertamina must turn over revenues it derives . . . [and the ROI] owns most of the hundreds of millions of dollars in oil and gas revenues in trust accounts in the United States. . . ." *Id.* The ROI's assertions of interdependence and control over Pertamina demonstrate that the ROI has had ample opportunity to voice its opinions by and through its subsidiary.

Moreover, allowing the ROI to proceed as an *amicus* would, in effect, unfairly extend the page limits for petitioners strictly set forth in the Rules. *See* Sup. Ct. Rule 37.1(g). Pertamina should not be allowed "two bites at the apple."

II. THE ROI RAISES A QUESTION FOR REVIEW THAT WAS NOT PRESENTED BY PERTAMINA IN ITS PETITION FOR A WRIT OF CERTIORARI.

The petition for certiorari seeks this Court's review of whether the decision below conflicts with the decisions of other courts of appeals regarding whether a court may defer to arbitrators' determinations regarding the appropriateness of their own appointment. *See* Pet. 15-16. That issue, however, is not addressed at all by the ROI. Instead, the ROI asks this Court to decide an entirely different question: whether the lower courts should have applied federal common law in conducting a choice-of-law analysis to determine what country's procedural law governed the arbitration in this case. *See* ROI Br. 5.

That question was not raised by Pertamina or even addressed in the petition. It is well-established that this Court will not grant certiorari to address questions that were not raised in the petition, particularly if raised only by an *amicus*. *See Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 262, n.6 (1994) (declining to address a First Amendment question argued by respondents and the *amici*, but not presented for review in the petition); *Knetsch v. United States*, 364 U.S. 361, 370 (1960) (finding "no reason" to address an argument advanced only in an

amicus brief, and not the petition). Because the ROI seeks to have this Court review an issue not even discussed in the petition, the ROI's proposed *amicus* brief adds nothing to the petition for certiorari, and its motion for leave to file should be denied.

III. THE ISSUE PRESENTED BY THE ROI DOES NOT WARRANT THIS COURT'S REVIEW.

As part of its and Pertamina's continuing efforts to avoid and delay the enforcement of the arbitral award,[3] the ROI claims that this Court should grant certiorari to resolve the question of whether a court must apply federal common law to a choice-of-law analysis in deciding what country's procedural law governed an international arbitration. For several reasons, this issue does not warrant the Court's review.

First, the decision below does not conflict with the decision of any other court of appeals. Despite the ROI's contention that the Fifth Circuit's decision is in tension with decisions of the First and Second Circuits, those two cases address entirely different questions. The question before the Fifth Circuit was what procedural law governed the arbitration proceedings – which, in turn, supplied an answer to the question of what country's judicial system would have been an appropriate forum in which Pertamina could seek to annul the award. Neither case cited by the ROI analyzed this question.

The first case, *InterGen N.V. v. Grina*, 344 F.3d 134, 143 (1st Cir. 2003), addressed whether a non-signatory could compel another non-signatory to arbitrate a complex dispute; the court applied federal common law, rather than state law, in holding that a non-signatory is "not

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[3] The ROI appeared as *amicus curiae* before the Fifth Circuit, which rejected each of its arguments. *See* Pet. App. 17a. In a prior opinion arising from the same arbitration, where the ROI also appeared as an *amicus*, the court characterized Pertamina's last-minute argument that Indonesian procedural law governed the arbitration in Switzerland as "certainly sufficient grounds to find Pertamina's behavior dubious and somewhat deceptive." *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 369, n.50 (5th Cir. 2003). The Fifth Circuit also noted that Pertamina "appear[ed]" to be "acting in bad faith by pursuing annulment in Indonesia." *Id.* at 372; *see* KBC Br. 3-4.

subject to compulsory arbitration." *Id.* at 150. In an effort to claim that *InterGen* conflicts "in principle" with the Fifth Circuit's decision, ROI Br. 9, the ROI contends that the First Circuit chose to apply federal common law *over* the New York Convention. That argument is simply incorrect; the court answered the threshold question of whether non-signatories were bound by an arbitration agreement before applying the New York Convention, but then stated that "so long as the parties are bound to arbitrate. . ., the court is under an *unflagging, nondiscretionary duty* to . . . enforce the New York Convention" and compel arbitration. *InterGen,* 344 F.3d at 142 (emphasis added). *InterGen* thus had nothing to do with whether, in a case seeking to confirm an arbitral award under the New York Convention, federal common law must be applied to determine what procedural law governed the arbitration. Indeed, if anything, *InterGen* actually supports the application of the New York Convention in interpreting what procedural law governs an arbitration between signatories to an arbitration agreement.

The second case on which the ROI relies for a purported circuit conflict similarly analyzed whether a party could be compelled to arbitrate. In *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.,* 198 F.3d 88, 95 (2d Cir. 1999), the Second Circuit addressed whether a subsequent assignee could be bound by an arbitration clause. In affirming the order compelling arbitration, the court applied federal common law, rather than state law, in holding that the parties' complex corporate relationships justified allowing an assignee to invoke an arbitration clause. As with *InterGen*, this case had nothing to do with whether, in a case seeking to confirm an arbitral award under the New York Convention, federal common law must be applied to determine what procedural law governed the arbitration. And although the ROI argues that the Second Circuit chose to apply federal common law *over* the New York Convention, ROI Br. 10, in reality the court merely chose to apply federal common law over

state law in interpreting the contract to answer the threshold arbitrability question. *Smith/Enron Cogeneration*, 198 F.3d at 96. This decision, like *InterGen*, presents no conflict with the decision below.

Second, even if a circuit conflict arguably existed regarding whether a court must apply federal common law in determining what procedural law governed an arbitration (and thus in what country a party could appropriately challenge an arbitral award), this would not be an appropriate case in which to address such a conflict. In its brief, the ROI argues that Indonesian procedural law governed the arbitration, and thus that Indonesia was the appropriate country in which to challenge the arbitral award. This argument, however, is wholly inconsistent with Pertamina's repeated and consistent arguments that *Swiss* procedural law applied to the arbitration, and that *Switzerland* was the appropriate country in which to challenge the award. As the Fifth Circuit noted, "[f]rom 1998 to April 2002, *Pertamina consistently and repeatedly took the position before the Tribunal, the Swiss courts, and the United States district court, that Swiss procedural law applied to the arbitration*." Pet. App. 16a, n.24 (emphasis added). Not until much later did Pertamina reverse course and assert that "Indonesian, not Swiss, procedural law had applied to the arbitration." Pet. App. 17a.

Based on these clear statements, the Fifth Circuit held that the district court did not abuse its discretion in holding that Pertamina was judicially estopped "from arguing against the application of Swiss procedural law." Pet. App. 25a. This holding provides an alternative ground supporting the Fifth Circuit's decision, and the ROI does not seriously contend that the district court's fact-specific holding on this issue – reviewed for an abuse of discretion – presents a question warranting this Court's review.[4]

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[4] Throughout its opinion, the Fifth Circuit described the various statements Pertamina had made in arguing that Swiss procedural law applied, including:

Third, the ROI's argument that federal common law – rather than the New York Convention – must be applied in determining what procedural law governed the arbitration is inconsistent with arguments it and Pertamina made earlier in this case. Before the ROI filed its second *amicus curiae* brief in the Fifth Circuit (on Pertamina's Rule 60(b) motion to the Fifth Circuit), the ROI and Pertamina had argued consistently that the courts should apply the New York Convention, not federal common law, in deciding what procedural law governed the arbitration. The ROI's recent attempt to argue that those courts should have instead applied federal common law is thus nothing more than another effort to improperly delay the enforcement of a valid arbitral award.

Fourth, even if the ROI were correct that the lower courts should have undertaken a choice-of-law analysis under federal common law, the ROI is wrong that such an analysis would lead to the conclusion that Indonesian procedural law governed the arbitration. Moreover, as the Fifth Circuit held, courts conduct "the multifactor choice-of-law analysis" under the Restatement (Second) of Conflicts only "in the absence of an effective choice of law by the parties to the

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> As but one example, Pertamina cited Swiss procedural law in arguing that the Tribunal could not consolidate the claims under the JOC and ESC into one proceeding. Pertamina at no point argued to the Tribunal that Indonesian procedural law applied. Pertamina initially sought to set aside the Award in a Swiss court. Pertamina asked the Texas district court to stay its enforcement proceeding until Pertamina's appeal in Switzerland was resolved. In making this argument, Pertamina stated that "[t]he arbitration . . . was conducted according to the laws of Switzerland, and the Swiss court is empowered to vacate an award rendered in Switzerland. . . . KBC is asking this Court to act prematurely to confirm an award that might be overturned in the country whose law governed the arbitration."

Pet App. 23a-24a; *see also* Pet. App. 116a (denying Pertamina's Rule 60(b) motion and specifically "reject[ing] Pertamina's assertion that the parties' contracts designate the application of Indonesian arbitral law"). Given Pertamina's consistent and unambiguous statements that Swiss procedural law applied to the arbitration, the Fifth Circuit correctly concluded that the district court had not abused its discretion in concluding that those statements satisfied this Court's standard for applying judicial estoppel against a litigant – that a "party's later position be clearly inconsistent with its earlier position." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001). Importantly, the Fifth Circuit also noted that "[b]oth the Tribunal and the district court relied on these representations in their decision making." Pet. App. 26a.

arbitration agreement" – but in this case "the parties presumptively chose Swiss procedural law as the *lex arbitri* when they designated Switzerland as the site of the arbitration, and that presumption is unrebutted." Pet. App. 22a-23a. Moreover, as the Fifth Circuit held, "[c]ertain sections and comments of the *Restatement* [of Conflict of Laws] also support a determination that Swiss law applied to the arbitration agreement." Pet. App. 23a, n.43. The ROI is thus simply wrong to contend that the application of "the correct choice of law rule . . . is outcome-determinative in this case." ROI Br. 10. Under any reasonable interpretation of the New York Convention, the parties' agreements, and Pertamina's prior judicial statements, Swiss procedural law (and not Indonesian procedural law) governed the arbitration, and thus Indonesia was not an appropriate forum in which to challenge the arbitral award.

CONCLUSION

For the foregoing reasons, KBC respectfully requests that the Court deny the ROI's motion for leave to file its *amicus curiae* brief, and that its *amicus curiae* brief either be stricken from the record or given no weight when Pertamina's petition is considered.

Respectfully submitted,

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